No. 87-172

IN THE

Supreme Court of the United States

October Term 1986

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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ALLAN DUNLAP,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED FOR REVIEW

I. The prurient interest standard of *Miller v. California*, 415 U.S. 15 (1973), should now be reconsidered because: (A) it is now a meaningless phrase under *Kolender v. Lawson*, 461 U.S. 352 (1983); (B) this part of the *Miller* standard fails to accommodate required community tolerance of the materials at issue.

II. The Arkansas obscenity law is void for vagueness under the First Amendment under *Kolender* or violates the *Miller* standard because: (A) It misapplies the prurient interest prong of *Miller* by using "prurient interest of the average person" instead of *Miller's* requirement that the "average person would find that it appeals to the prurient interest"; or (B) it confuses the patently offensive standard by defining "patently offensive" by itself.

III. The Arkansas courts' rulings requiring petitioner to show community acceptance of similar adult materials before they could be admissible on the issue of tolerance in the community as evidence of "community standards," when the state has no similar burden, effectively shifted the burden of proof to the petitioner that the materials involved were not obscene in violation of the due process clause of the Fourteenth Amendment.

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d/b/a American Arcade,

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v.

STATE OF ARKANSAS,

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 292 Ark. 51, 728 S.W. 2d 155 (1987). It is reproduced in the Appendix.

JURISDICTION

The judgment of the Arkansas Supreme Court was rendered on April 27, 1987. On

June 11, 1987, Justice Blackmun granted petitioner's motion for an enlargement of time to file this petition to July 26, 1987. This petition is thus filed within that time. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the U.S. Constitution, § 1, provides in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

Ark.Stat.Ann. § 41-3585.2 (Supp.1985):

> (1) . . . [A] person commits promoting obscene materials if he knowingly:

(a) Promotes, or has in his possession with intent to promote any obscene material;

(b) As used in this Section, "material" means any writing, picture, motion picture, films, slides, drawings, or other visual reproductions.

(2) Promoting obscene materials is a class D felony.

Ark.Stat.Ann. § 41-3585.1 (Supp.1985):

(2) "Hard-core sexual conduct" means patently offensive acts, exhibitions, representations, depictions, or descriptions of:

(a) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body in the genital or anal openings of any person's body.

(b) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of the genitals, or excretory functions, actual or simulated.

. . .

(4) "Obscene material" means that material which:

(a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(b) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

A. Introduction

The facts of this case are neither difficult nor controverted. This case presents a straightforward challenge to the continued viability of the *Miller* standard (*Miller v. California*, 413 U.S. 15 (1973)) and to the constitutionality of the Arkansas obscenity law under which petitioner was convicted. Ark.Stat.Ann. §§ 41-3585.1-41-3585.2 (Supp.1985).

Petitioner operates the American Arcade, an "adult materials" outlet in Little Rock, Arkansas. On July 18, 1985, petitioner sold an "adult" videocassette movie and an "adult" magazine to a police officer.[1] On September 11, 1985, peti-

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[1] The vice officer testified that he was in plainclothes but not operating undercover.

The officer had been there before. The police made two cases against petitioner: CR85-1325 occurring February 12, 1985, and CR85-2283 (this case) occurring July 18, 1985. Petitioner was not arrested

tioner was charged by information in Pulaski County Circuit Court with one count of promoting obscene materials in violation of § 41-3585.2. Petitioner was also charged in another case (CR85-1325) with the same offense occurring shortly before the one before the Court. That case involved a soundless 10 minute 8 mm film and a magazine. (*See* note 1, *supra*.)

Petitioner moved to dismiss the charges on January 6, 1986 on the ground that the Arkansas statute and the *Miller* standard on which it is based were void for vagueness under the First Amendment to the United States Constitution and *Kolender v. Lawson*, 461 U.S. 352 (1983). The trial court denied the motion.

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at the time of the buys. He was arrested March 8, 1985 in 1325, and July 31, 1985 in 2283. Petitioner was later separately charged direct in Pulaski County Circuit Court by information.

Petitioner knew that he was selling these materials to a police officer and that there was a possibility that he would be prosecuted on both occasions.

B. The trial

Petitioner proceeded to trial on January 29-30, 1986 with both cases being tried together. Petitioner stipulated that the movies were sold and that petitioner was responsible. The state rested, and petitioner's motion for directed verdict for failure of proof and on constitutional grounds was denied.

Petitioner's defense at trial was twofold, and both were rejected. First, petitioner contended that the statute was unconstitutional because the operative language of *Miller*, on which the statute was based, no longer (if it ever) had any meaning to lawyers or ordinary people. Second, petitioner contended that the easy availability of similar materials in the community showed that the community tolerated these materials and, therefore, the community standards were not violated.

In the trial, petitioner presented the

testimony of two clinical psychologists who practiced in Pulaski County, Dr, James Moneypenny and Dr. Douglas Stevens, who testified that: (1) they viewed the materials and the materials involved were the same as materials commonly recommended by psychologists and psychiatrists for sexual dysfunction therapy and marital counseling; (2) the subject matter and scenes portrayed in the materials were not uncommon fantasies for normal persons, and nothing in the materials appeared abnormal to them[2]; (3) and, in their training and

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[2] The subject matter of the videocassette was a man having a sexual relationship with a woman and her grown daughter. He had a prior relationship with the woman some 20 odd years prior to that, and she suggested to him that the younger woman was his child after he had intercourse with the younger girl. She never would tell him whether the daughter was his child. He fails to resolve the moral issue in a way the state would find satisfactory. The state questioned the psychologists about these fantasies of incest (who found them not unusual as long as they are never acted on), and the state argued in close that the movie sympathetically portrayed incest thereby making it

education, the phrase "prurient interest of the average person" used in the Arkansas statute was a meaningless phrase and a nonsequitur because there is no such thing as a "prurient interest of the average person" -- they are mutually exclusive terms.

Because the state objected, the trial judge would not permit them to testify that they could find nothing in the materials that appealed to the "prurient inter-

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appeal to the prurient interest.

If the subject matter of incest makes the videocassette obscene, then, under this subjective test could not the Bible be found obscene because of its references to sex, particularly the descriptions in the *Song of Soloman* and its references to incest where incest is not clearly labelled as immoral? *See, e.g., Genesis* 11:29 (Nahor) 19:31-36 (Lot), 20:12, 13 (Abraham) 35:22 (Reuben), 38:16-18 (Judah), 49:4 (Reuben); 2 *Samuel* 13:14 (Amnon); 2 *Samuel* 16:21, 22 (Absalom); *Matthew* 14:3, 4 (Herod); *Luke* 3:19 (Herod); *Amos* 2:7 (Israel). (Incest is, of course, declared immoral and a violation of God's law in other books in the Bible.)

Would not, then, making the subject matter of a movie murder or rape make it obscene if there was any sex in it at all?

est of the average person." An offer of proof was made.

The state also objected to petitioner putting on proof that the same or similar materials were available at eight or ten different outlets in the Pulaski County area. Petitioner countered that evidence of equally available materials between the time of the offense and the trial of the case was relevant to the question of community standards in showing what the community would tolerate in the area of adult materials even though not all persons would necessarily frequent such stores. The trial judge sustained the state's objection and prohibited it because petitioner had to show community acceptance to get similar materials into evidence. Again, petitioner made an offer of proof out of the hearing of the jury (at the conclusion of the first day's testimony), and approximately ten videocassettes with

(in some cases more than one) adult movies rented at those locations and copied onto them were offered into evidence on the offer.

Petitioner also argued that the trial court's ruling requiring petitioner to show general community acceptance of adult materials to be able to put on evidence of other materials being available on the question of tolerance in the community and community standards unconstitutionally shifted the burden of proof to petitioner to prove that material he sold and the other material were not obscene. Petitioner noted that the state shouldered no similar burden of producing any evidence other than the materials themselves on the question of obscenity, and this all denied petitioner due process at his trial. The trial court abided by its ruling.

C. The constitutional challenge to the statute

At the conclusion of the first day of the trial, the lawyers and the court had a jury instruction conference, and petitioner challenged the jury instruction on the statute and the *Miller* standard as being void for vagueness or not complying with *Miller*, and because the *Miller* standard had lost its meaning over time. Petitioner also challenged the statute as having a circular definition of "patently offensive" in violation of *Miller*.

Petitioner raised all the same arguments in a motion for directed verdict at the close of his case.

D. The verdict

After lengthy deliberations, the jury convicted petitioner in this case (2283), but the jury failed to agree as to the other case (1325), and a mistrial was declared as to that charge. The jury recom-

mended a sentence of 6 months imprisonment in the Arkansas Department of Correction and a fine of $5,000. The state dismissed the mistried charge.

E. The sentencing

Sentencing was held the following day on January 31, 1986. Petitioner testified at the sentencing that, based on the verdict, he instructed his employees to screen all materials which showed incest to remove them from the shelves. He put that proof on to mitigate punishment.

The trial judge imposed the sentence recommended by the jury. Execution of sentence was stayed pending appeal.

F. The appeal

The oral argument of petitioner's appeal was interesting. Three of the Justices of the Arkansas Supreme Court expressed an interest in this argument that the *Miller* standard should be re-

placed in light of *Kolender*. Alternative standards were discussed.

Nevertheless, the Arkansas Supreme Court affirmed petitioner's conviction on April 27, 1987, with one Justice dissenting, rejecting all of petitioner's constitutional challenges. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155 (1987). Justice Purtle in dissent found the statute void for vagueness and that the trial court had shifted the burden to petitioner. *Id.* at 265.

Execution of sentence was stayed pending this petition for certiorari likely in part because of the decision in *Pope v. Illinois*, 107 S.Ct. 1918, decided May 4, 1987.

SUMMARY OF THE ARGUMENT

I. THE *MILLER* STANDARD FOR OBSCENITY CASES SHOULD NOW BE RECONSIDERED BY THIS COURT.

The-three pronged *Miller* standard of *Miller v. California* 413 U.S. 15 (1973), has proved to create hopeless subjectivity in obscenity prosecution. Actors, police officers, prosecutors, judges, and juries cannot agree on what is obscene.

Ten years after *Miller*, this Court decided *Kolender v. Lawson*, 461 U.S. 352 (1983), another void-for-vagueness case holding that laws which require the exercise of subjective judgment to enforce them are unconstitutionally void for vagueness. The *Miller* standard is void for vagueness under *Kolender*. Since the Arkansas obscenity statute is based on *Miller*, it fails, too.

Furthermore, the *Miller* standard fails to permit reference to community tolerance

as evidence of community standards. There is a split in the decisions on this issue meriting review by this Court.

An alternative to the *Miller* standard would limit obscenity prosecution to depiction of violent, forced, or degrading sex, child pornography, distribution to minors, and limits on the airways as Congress sees fit.

II. THE ARKANSAS OBSCENITY STATUTE IS UNCONSTITUTIONAL UNDER THE *MILLER* STANDARD.

Alternatively, the Arkansas statute fails the *Miller* standard because (A) it uses the phrase "prurient interest of the average person" and not "the average person, applying contemporary community standards would find that the work appeals to the prurient interest"; and (B) the statute defines "patently offensive" by itself creating a fatal ambiguity under *Miller*.

III THE ARKANSAS COURTS UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO PETITIONER TO PROVE THAT THE PROFFERED MATERIALS SATISFIED COMMUNITY STANDARDS WHEN THE STATE HAD NO BURDEN TO PROVE THAT THE PROSECUTED MATERIALS OFFENDED THE COMMUNITY STANDARDS.

Petitioner sought to put into evidence similar adult materials obtained from several outlets in the venier as evidence of community standards and to show that the community tolerates such material even if a large segment of the population does not frequent such stores. The state objected, and the trial court prohibited it on the ground petitioner did not prove an unarticulated level of acceptance of adult materials in the community. Petitioner objected to the court's holding as shifting the burden to petitioner to prove that the materials were not in violation of community standards (*i.e.*, not obscene) to get them into evidence in violation of due

process because the state had no similar burden to do anything to get its case to the jury other than put the materials into evidence and rest.

REASONS FOR GRANTING THE WRIT

I. THE *MILLER* STANDARD FOR OBSCENITY CASES SHOULD NOW BE RECONSIDERED BY THIS COURT.

A. Petitioner challenged the *Miller* standard below, and the trial court and Arkansas Supreme Court rejected the challenge. A week later, this Court decided *Pope v. Illinois*, 107 S.Ct. 1918 (No. 85-1973, decided May 4, 1987). *Pope* demonstrates that *Miller* should be re-examined in favor of a new standard that is easy to understand and apply by actors, police, prosecutors, judges, and juries and would remove nearly all subjectivity from obscenity law enforcement.

Pope was a 5-1-3 decision. The tenor of the dissents and concurrences show that at least four Justices of this Court recognize that the *Miller* standard is no longer viable.

B. The *Miller* standard is subjective

and hopelessly vague. The *Miller* standard, we submit, fails the void-for-vagueness standard of *Kolender v. Lawson*, 461 U.S. 352 (1983), decided ten years later.

In *Kolender* the Court held unconstitutionally vague a California statute requiring persons who loiter or wander on the streets to account for their presence when requested to do so by a police officer. That statute was held to be impermissibly vague because it failed to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification, thus leaving that determination up to the subjective judgment of law enforcement authorities; *id.* at 358.

> Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith* [*v. Goguen*], 415 U.S. at 574.

The Court quoted with approval; *id.* at 358

n.7; the 1875 decision in *United States v. Reese*, 92 U.S. 214, 221:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

The *Kolender* Court pointed out that the discretion accorded to the police to determine who was in violation of the law encouraged arbitrary enforcement; *id.* at 360-61. *And see id.* at 360:

> [I]t necessarily "entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat'" . . . "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" . . . and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." (citations omitted)

The rationale and holding of *Kolender* applies to obscenity litigation and calls into question the standardless sweep of any statute based on *Miller*. Justice

Brennan's dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973), decided with and applicable to all five of the *Miller* cases, emphasized the capriciousness of obscenity law enforcement, properly analyzes the vagueness issue in light of *Kolender*.

This vagueness issue has been repeatedly emphasized in dissenting opinions since then. *See Smith v. United States*, 431 U.S. 291, 310 (1977) (Brennan, J., dissenting); *id.* at 315-16 (Stevens, J., dissenting)[3]; *Sewell v. Georgia*, 435 U.S.

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[3] "The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a

982, 985-88 (1978) (Brennan, J., dissenting from denial of certiorari). Most recently, four members of the Court noted in *Pope v. Illinois*, 107 S.Ct. 1918 (1987),

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subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

"This conclusion is especially troubling because the same image--whether created byu words, sounds, or pictures--may produce such a wide variety of reactions. As Mr. Justice Harlan noted: [It is] often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25. In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment." (footnotes omitted)

that the *Miller* standard should be changed. Justices Stevens, Brennan, and Marshall observe that obscenity laws cannot be applied to consenting adults. *Id.* at 1924 (dissenting opinion). Justice Scalia concurring noted that the fractured opinions of the Court "display a need for reexamination of *Miller*." *Id.* at 1923 (Scalia, J., concurring).

Justice Blackmun's opinion concurring and dissenting does not address this issue, but he notes that "a majority [should not] dictate to discrete segments of the population what material has value" under the *Miller* standard. *Id.* at 1924 (Blackmun, J., concurring and dissenting). *See Miller, supra*, at 34 ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these

works represent.").

The *Miller* standard now does just that, so it is not working as the Court originally intended. The "prurient interest" and "patently offensive" standards have lost any meaning that the Court once thought they had.

The subjectivity in this case is apparent from the fact that the jury deadlocked on one count where the material had the slimmest of plot line and little if any serious literary or artistic value at all. It appears that having themes in the material caused the conviction here. This typifies the *Kolender* vagueness and arbitrariness problem in obscenity prosecutions.

C. The community standards test of *Miller* was interpreted below as foreclosing defense reference to "community tolerance" as it relates to "community standards." The Arkansas courts' denying peti-

tioner the opportunity to litigate community tolerance is contrary to decisions of state and federal courts on this same issue: *See, e.g., Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1029 (5th Cir. 1981), *cert. den.* 455 U.S. 913 (1982); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 360-61 (Colo.1085); *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738, 748 (Tenn.1979). *See also Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987, 1001 (D.Utah 1982); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164, 1171-72 (D. Utah 1982); *Goldstein v. Allain*, 568 F. Supp. 1377 (N.D.Miss. 1983). *Contra: State v. Barrett*, 278 S.C. 92, 292 S.E.2d 590, 592 (1982); *Andrews v. State*, 652 S.W.2d 370 (Tex.Crim.App. 1983).

D. While this is not the time to discuss alternatives to *Miller*, one alternative could be suggested as a starting

point:

The Attorney General's Commission on Pornography (1986) divided pornographic materials into four groups according to their alleged harm to the recipient:

(1) sexually violent material;

(2) nonviolent materials depicting degradation, domination, subordination, or humiliation;

(3) nonviolent and nondegrading materials; and

(4) nudity.

Even accepting the Commission's conclusions[4] it is reasonable to draw the line for what is constitutionally obscene to include: (a) the sexually violent which the majority of the Commissioners con-

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[4] We do not accept the Commission's conclusions because of the flawed nature of the methodology of the report. *See, e.g.*, Donnerstein, Linz & Penrod, The Question of Pornography: Research Findings Policy Implications (1987). Since many persons do and since this Court followed the minority report of the President's Commission of Obscenity and Pornography (1970) in *Miller*, we at least discuss it.

cluded (without much factual basis) incites sex crimes, (b) and maybe nonviolent materials depicting degradation, domination, subordination, or humiliation (but including that may even lead to vagueness problems). (c) Also to be included should be child pornography; *New York v. Ferber*, 458 U.S. 747 (1982); (d) dissemination to minors of any of the materials described by the Commission (since the interest in protecting minors reduces the vagueness problem as to them); *Ginsburg v. New York*, 390 U.S. 629 (1968); and (e) continued regulation of the airways as the FCC and Congress see fit since minors can tune into "offensive programs"; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

E. Adopting this as a possible standard, we submit, would substantially reduce the number of constitutional challenges to obscenity laws heard by this Court and other appellate courts. Such a

standard is clear to everyone and it eliminates subjectivity from obscenity laws. One would easily know whether the materials at issue violate the obscenity laws without having to wonder what a particular jury will do on a particular day anywhere in the country. Even other standards may be possible to formulate. At any rate, some standard other than *Miller* has to be adopted.

II. THE ARKANSAS OBSCENITY STATUTE IS UNCONSTITUTIONAL UNDER THE *MILLER* STANDARD.

Aside from the vagueness problem of obscenity statutes in general, this standard has two constitutional defects even under *Miller*: (A) The statute uses the phrase "prurient interest of the average person" and not "the average person, applying contemporary community standards would find that the work appeals to the prurient interest"; and (B) the statute defines "patently offensive" by itself creating a fatal ambiguity under *Miller*.

A. *Miller* requires in its first prong that "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." *Miller, supra*, at 24. The Arkansas statute, however, uses "prurient interest of the average person." Ark. Stat.Ann. § 41-3585.1(4)(b)

(Supp.1985). These are two entirely different concepts.

The testimony of Drs. Moneypenny and Stevens at trial shows that there is no such thing as "prurient interest of the average person" because the average person harbors no prurient interest. Prurient interest is something held by a person with an abnormal or shameful interest in sex, and the average person has a normal, healthy interest in sex. This is clearly not what the Court intended in the *Miller* standard. *Brockett v. Spokane Arcades*, 105 S.Ct. 2794, 2799 (1985).

The jury here was instructed over petitioner's objection that "'prurient interest' is a morbid, sick, or shameful interest in sex, as distinguished from a normal interest in sex." (T.416) Thus, the phrase "prurient interest of the average person" was defined to the jury as the "morbid, sick, or shameful interest in

sex, as distinguished from a normal interest in sex of the average person." This instruction, based entirely on the Arkansas statute, makes no sense at all to ordinary persons, and it is impermissibly vague under *Miller* and *Kolender*. Also, the twisting of the prurient interest standard in the Arkansas statute makes it unconstitutional under *Miller*.

B. To compound the vagueness problem just discussed, the statute uses a circular definition in defining obscene materials which also makes it void for vagueness.

"Obscene material" is defined in § 41-3585.1(4) as "material which: (a) depicts or describes in a patently offensive manner . . . hardcore sexual conduct." "Hardcore sexual conduct" is defined in § 41-3585.1(2) as "patently offensive . . . depictions of [*e.g.*, intercourse]." Thus, obscene material" is defined in the Arkan-

sas statute as *a patently offensive depiction done in a patently offense manner*. Now, what is that supposed to mean? One cannot even determine what "patently offensive" is supposed to mean. This circular definition requires an actor and a jury to define the qualifier "patently offensive" by the qualifier itself.

Ordinary persons necessarily would differ as to the meaning of this phrase. It thus fails *Kolender* void for vagueness scrutiny.

III. THE ARKANSAS COURTS UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO PETITIONER TO PROVE THAT THE PROFFERED MATERIALS SATISFIED COMMUNITY STANDARDS WHEN THE STATE HAD NO BURDEN TO PROVE THAT THE PROSECUTED MATERIALS OFFENDED THE COMMUNITY STANDARDS.

In obscenity cases, the prosecution is not obliged under the First Amendment to put on proof of community standards to get its case to the jury. *Paris Adult Theatre I, supra,* at 56 n.6. Under the rulings of the Arkansas courts in this case, this goes one step further: Not only does the State *not* have to prove community standards, but the *defendant* in an obscenity case is obligated to prove "acceptance" in the community (*i.e.*, "community standards" are not violated) as a threshold question in order to put on proof to show that the material does not appeal to the prurient interest under community standards.

Thus, the Arkansas courts held, in ef-

fect, that the State has no burden of producing evidence on the issue of community standards but the defendant does. This unconstitutionally shifts the burden of proof to the defendant in obscenity cases to prove that the material is not obscene. The holding of the Arkansas court below thus is contrary to the holdings of this Court that the due process clause of the Fourteenth Amendment requires the prosecution to prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 702-03 & n.31 (1975).

The trial in an obscenity case is now such that, as here, the state puts on the offending materials and rests, and the burden shifts to the defendant to prove that the material at issue is not obscene. That is precisely what happened below.

C O N C L U S I O N

The petition for writ of certiorari to the Arkansas Supreme Court should be granted.

Respectfully submitted,

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A P P E N D I X

Dunlap v. State, 292 Ark. 51, 728 S.W.2d 155 (1987)

Allen DUNLAP d/b/a AMERICAN ARCADE *v.* STATE of Arkansas

CR 86-138

Supreme Court of Arkansas
Opinion delivered April 27, 1987

1. CONSTITUTIONAL LAW — OBSCENE SPEECH NOT PROTECTED BY FIRST AMENDMENT. — The protection of the First Amendment does not extend to obscene speech.
2. OBSCENITY — DEFINITION. — The United States Supreme Court has said that the guidelines for identifying obscenity are (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
3. OBSCENITY — "OBSCENE MATERIAL" — DEFINITION. — "Obscene material" is that which, taken as a whole and applying contemporary statewide standards, attempts to activate prurient interests.

4. OBSCENITY — ARKANSAS OBSCENITY STATUTES DRAFTED PURSUANT TO GUIDELINES ESTABLISHED BY THE UNITED STATES SUPREME COURT — SUFFICIENT GUIDELINES PROVIDED. — The Arkansas obscenity statute was drafted pursuant to the guidelines established by the United States Supreme Court and provide sufficient guidelines to law enforcement personnel to prevent arbitrary, discriminatory enforcement.
5. OBSCENITY — ARKANSAS STATUTE NOT VOID FOR VAGUENESS. — The Arkansas Legislature's phrasing of Ark. Stat. Ann. § 41-3585.1(4)(b), that obscene material means that material which, taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards, does not violate the standard established by the United States Supreme Court and, consequently, does not render the statute void for vagueness.
6. OBSCENITY — ARKANSAS DEFINITION OF "OBSCENE MATERIAL" NOT CIRCULAR. — The statutory definition of "obscene material," when read as a whole, is not circular.
7. EVIDENCE — EXPERT EVIDENCE — ADMISSIBILITY. — It is not error for the trial judge to fail to require expert evidence that materials were obscene when the materials themselves were placed in evidence, since the materials themselves are the best evidence of what they represent.
8. OBSCENITY — BURDEN OF PROOF ON STATE — SUFFICIENCY OF THE EVIDENCE. — The State met its burden of proof of obscenity by introducing the materials themselves; no separate proof of community standards was necessary.
9. OBSCENITY — BURDEN OF PROOF NOT SHIFTED TO DEFENDANT. — The defendant in an obscenity case was not required to prove that the materials introduced by the State were not obscene, nor was he required to prove community standards; the fact that he chose to offer such proof does not mean that the burden was shifted.
10. OBSCENITY — EVIDENCE THAT HARD-CORE PORNOGRAPHIC MATERIALS COULD BE PURCHASED AT OTHER LOCATIONS IN THE AREA PROPERLY EXCLUDED. — The proffered evidence that would have tended to prove that hard-core pornographic materials similar to that sold by the defendant could be purchased at other locations in the area was properly excluded, since the survey would not be representative of a statewide standard, as is required, and had no validity in methodology.
11. JURY INSTRUCTIONS — INSTRUCTION ON OBSCENE MATERIAL SUFFICIENT. — An instruction to the jurors that they were not to judge the allegedly obscene material on the basis of their personal opinions, but were to consider the material on the basis of a community

standard encompassing all levels of sensitivity, of religiousness and of economic, educational, and social standings, sufficiently covered the issue, and the trial court did not commit reversible error by refusing to give appellant's requested instruction on the same issue.

12. APPEAL & ERROR — FAILURE TO OBTAIN A RULING ON OBJECTION — EFFECT. — Where the appellant failed to get a ruling on his objection, he may not pursue the matter on appeal.

13. APPEAL & ERROR — FAILURE TO SHOW PREJUDICE — EFFECT. — The appellate court will not reverse where the appellant is unable to show that he was prejudiced in any manner.

Appeal from Pulaski Circuit Court, Fifth Division; *Jack Lessenberry*, Judge; affirmed.

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was convicted of promotion of obscene material under Ark. Stat. Ann. § 41-3585.2 (Supp. 1985). He argues five points of appeal, but since none of the points involves the sufficiency of the evidence, we need not recite the facts. We affirm the conviction.

Appellant's first point is that the material statute, § 41-3585.2, is void for vagueness under the Free Speech and Due Process provisions of the first and fourteenth amendments to the Constitution of the United States.

[1, 2] In *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Supreme Court gave a concise review of its holdings and guidelines in the field of obscene materials.

> *Roth* [*Roth* v. *United States*, 354 U.S. 476 (1957)] held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.*, at 489 (footnote omitted). Earlier in its opinion, *id.*, at 487, n. 20, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:
>
> "*I.e.*, material having a tendency to excite lustful

thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines "prurient," in pertinent part, as follows:

"'. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . .'"

"Pruriency is defined, in pertinent part, as follows:

"'. . . Quality of being prurient; lascivious desire or thought . . .'

"See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242 (1915), where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* . . .' (Emphasis added.)

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz*:

"'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . .' See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Under *Roth*, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), established a much more demanding three-part definition of obscenity, a definition

that was in turn modified in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* guidelines for identifying obscenity are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229] at 230, quoting *Roth v. United States, supra*, [354 U.S.] at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

Miller thus retained, as had *Memoirs*, the *Roth* formulation as the first part of this test, without elaborating on or disagreeing with the definition of "prurient interest" contained in the *Roth* opinion.

The statute at issue was obviously drafted pursuant to the guidelines set out in *Miller* v. *California*, 413. U.S. 15 (1973). Appellant argues, however, that the *Miller* majority was slim; that the composition of the Supreme Court of the United States has changed since 1973; and that in the more recent case of *Kolender* v. *Lawson*, 461 U.S. 352 (1983), the Supreme Court has established a new vagueness analysis under which the critical inquiry is whether an allegedly vague statute encourages arbitrary, discriminatory enforcement by police, prosecutors, judges, and juries.

We recognize the difficulty in defining obscenity. In fact, barely more than a decade after the Supreme Court defined obscenity in *Roth* v. *United States*, 354 U.S. 476 (1957), Justice Harlan in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), stated "the subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication. In the 13 obscenity cases [as of 1968] in which signed opinions were written, [there] has been a total of 55 separate opinions among the Justices." 390 U.S. at 704-5. True to form, in *New York* v. *Ferber*, 458 U.S. 747 (1983), there were four separate opinions. Although the Supreme Court has had

difficulty with the definition of obscenity, and even though the composition of the Supreme Court has changed, we are constrained to follow *Miller*. In addition, we are not convinced that the guidelines pronounced in *Miller*, and thus also our statutory definition of "obscene material," have been made constitutionally infirm by the opinion in *Kolender, supra*. In *Kolender*, which did not involve obscenity, the Court explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The Court noted that although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, it has recently recognized that the more important aspect of the doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. Thus, even if the Court has recently focused more attention on the second phase of the analysis, it was nevertheless a consideration before *Kolender*. Further, even if we examine the statute with special emphasis on the question of whether it encourages arbitrary, discriminatory enforcement, we find that it does not. Our obscenity statutes provide sufficient guidelines to law enforcement personnel to prevent arbitrary, discriminatory enforcement.

Ark. Stat. Ann. § 41-3585.1(4) (Supp. 1985) defines "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> (b) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Appellant argues that the statute is additionally void for vagueness because it uses the term "prurient interest of the average person" in subsection (4)(b) which is undefined in the

statute and which no longer has any substantive meaning. Appellant quotes several dictionary definitions of "prurient" from 1935 forward and argues that the more recent definitions do not contain "shamefulness" or "morbidness," but rather describe normal human responses which cannot be considered obscene; that the jury was instructed that " '[p]rurient interest' is a morbid, sick, or shameful interest in sex, as distinguished from a normal interest in sex"; that two defense witnesses, Dr. Stevens and Dr. Moneypenny, testified that "average persons" do not have "morbid, sick or shameful interests in sex"; that the term is thus vague and confusing and cannot provide notice; and, therefore, use of the term in our statute makes it void for vagueness. This argument is also without merit.

According to appellant's own history of Webster's definitions, the 1961 edition did not use the terms "shameful" or "morbid" in defining "prurient," yet in *Miller, supra*, which was decided in 1973, the Supreme Court used the term "prurient" in establishing guidelines for defining "obscenity." Further, the Court has continued to use the term "prurient interest" in discussing obscenity cases, and the definition of that term contained in the jury instruction in the instant case was tacitly approved by the Supreme Court as recently as 1985 in *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Further, the term "appeal" is defined as follows:

> 1. An earnest or urgent request, entreaty, or supplication. 2. A resort or application to some higher authority, as for sanction, corroboration, or decision . . . 3. The power of attracting or of arousing interest . . .

The American Heritage Dictionary of the English Language 62 (1981).

[3] After examining our statute as a whole, we are convinced that the legislature intended for the word "appeals," in the following statutory definition of "obscene material," to have the first definition quoted above:

> (4) "Obscene material" means that material which:
>
> . . .
>
> (b) Taken as a whole, *appeals* to the prurient interest of the

> average person, applying contemporary statewide standards;

(Emphasis added.)

Thus, "obscene material" is that which, taken as a whole and applying contemporary statewide standards, *attempts* to activate prurient interests. The average person is quite capable of making that determination and whether or not the material is successful in doing so is beside the point.

[4, 5] As mentioned previously, our obscenity statute was obviously drafted pursuant to the guidelines established in *Miller*. The first of those guidelines is: "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ." *Miller*, 413 U.S. at 24. At first blush, it might seem that the legislature had mistakenly transposed the words of the *Miller* guideline and, thereby, created a new concept by using the phrase "prurient interest of the average person." However, in *Hamling* v. *United States*, 418 U.S. 87, 128-30 (1974), the Supreme Court stated:

> Petitioners contend that the District Court's instruction was improper because it allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group. Our decision in *Mishkin* v. *New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, *i.e.*, whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded.
>
> . . .
>
> The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex.

> In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups. Such an instruction was also consistent with our recent decision in the *Miller* case. We stated in *Miller*:
>
> > "As the Court made clear in *Mishkin v. New York*, 383 U.S., at 508-509 [16 L. Ed. 2d 56], the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group*, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one." 413 U.S., at 33, 37 L. Ed. 2d 419 (emphasis added).

The legislature's phrasing of subsection (4)(b) does not violate the standard established in *Miller* and further explained in *Hamling*. Consequently, it does not render the statute void for vagueness.

[6] Appellant's final vagueness argument is that the statute uses a circular definition which ordinary persons cannot understand in defining "obscene material." He argues that the result of the circularity is that, in effect, our statute defines "obscene material" as a patently offensive depiction done in a patently offensive manner. This argument is also without merit and requires little discussion. Again, Ark. Stat. Ann. § 41-3585.1 (Supp. 1985) provides the following definition of "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> . . .

"Sadomasochistic abuse," "sexual conduct," and "hard-core sexual conduct" are all defined in the same statute as follows:

> (2) "Hard-core sexual conduct" means patently offensive

acts, exhibitions, representations, depictions, or descriptions of:

(a) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body.

(b) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of the genitals, or excretory functions, actual or simulated.

. . .

(8) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context.

(9) "Sexual conduct" means human masturbation or sexual intercourse.

The statutory definition read as a whole, and not as appellant has abbreviated it, is simply not circular.

Appellant's second point of appeal also contains subpoints. He argues that the trial court erred in barring him from presenting evidence of the general availability of sexually explicit adult materials in the Little Rock metropolitan area at the time of the alleged offense as evidence of tolerance of the material or of community standards. He further argues that the trial court thereby shifted to him the burden of proving community standards which violated the due process clause. The arguments have no merit.

Appellant proffered testimony that several commercial sources of material similar to that in question were "fairly busy" when visited by the witness. All of the commercial sources were located in the Little Rock metropolitan area. The trial court ruled that the testimony was not admissible. The ruling was correct for a number of reasons.

[7] In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), decided on the same day as *Miller, supra*, the Court held that it

was not error for the trial judge "to fail to require" expert evidence that the materials were obscene when the materials themselves were placed in evidence. "The films, obviously, are the best evidence of what they represent." 413 U.S. at 56. Footnote 6 to the foregoing sentence provides in pertinent part:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed.) (1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. *See United States* v. *Groner*, 479 F.2d —, — (slip opinion, at 19-20) (1973); *id.*, — (slip opinion, pp. 24-25) (Ainsworth, J., concurring). "Simply stated, hard core pornography . . . can and does speak for itself." *United States* v. *Wild*, 422 F.2d, at 34, 36 (CA2 1970), cert. denied, 402 U.S. 986, 29 L.Ed. 2d 152, 91 S. Ct. 1644 (1971).

[8, 9] Here, the State met its burden of proof of obscenity by introducing the materials themselves. No separate proof of community standards was necessary. Appellant was not required to prove that the materials were not obscene, nor was he required to prove community standards. The fact that he chose to offer such proof does not mean that the burden was shifted.

[10] The trial judge ruled correctly in excluding the proffered evidence. The proffered evidence would have tended to prove only that similar hard-core pornographic materials could be purchased at other locations in the Little Rock area.

[11] As set out in J. Monahan and L. Walker, *Social Science in Law: Cases and Materials* 118 (1984): "Surveys of the jurisdiction in which prosecution is initiated, employing the specific magazine or film implicated in the charge, are frequently commissioned in obscenity cases. Usually, but not always, they are commissioned by the defense. Their admissibility is a function of the validity of the researcher's methodology." Here, as in *United States* v. *Boltansky*, 346 F. Supp. 272 (D.C. Md. 1972), the trial court found that the survey was unrepresentative of the

community standard, and that it would be more confusing than probative in determining whether the material was obscene. The ruling was correct because the availability of similar illicit material would not necessarily show acceptance of the material. *Hamling* v. *United States*, 418 U.S. 87, 125-26 (1974). Even if availability did in some manner demonstrate acceptability, a survey of nine establishments selling obscene materials in the state's most urban area would not be representative of a statewide standard, as is required. *See* Ark. Stat. Ann. § 41-3585.1(4)(b) (Supp. 1985). We do not reverse a trial court's ruling on the admissibility of evidence unless there is a clear abuse of discretion. The survey had no validity in methodology. *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985). There was no abuse of discretion in excluding the evidence.

Appellant's third allegation of error is that the trial court wrongly refused to permit him to prove that community standards would tolerate the materials which he promoted; the court wrongly refused to permit him to argue the point to the jury; and, the court wrongly denied his proffered instruction on the issue. Again, the arguments are without merit.

Appellant renews his argument that he should have been allowed to put on proof of the availability of obscene materials at other places in the Little Rock area as evidence that community standards would tolerate the materials. The evidence was not admissible for the reasons previously stated. Since the proffered evidence was not admitted, the trial court ruled correctly in refusing to allow argument about that evidence.

The trial court instructed the jurors that they were not to judge the allegedly obscene material on the basis of their personal opinions, but were to consider the material on the basis of a community standard encompassing all levels of sensitivity, of religiousness and of economic, educational, and social standings. This instruction sufficiently covered the issue and the trial court did not commit reversible error by refusing to give appellant's requested instruction on the same issue. *Henderson* v. *State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Appellant next argues that the trial court erred in refusing to let him put on evidence of the context in which the material was sold, in refusing to let him argue about the context of the sales,

and in refusing to instruct the jury on the use of context as a factor in determining the community standard. Appellant does not specify a particular evidentiary ruling which he contends is erroneous. He only states: "Appellant made several attempts to put into evidence the context of the dissemination of the material as bearing on the issue of obscenity. The State did not object to some of it, but it did object to quite a bit pertaining to the context of dissemination and to closing argument on that issue and the trial court sustained those objections."

On direct examination of one of his witnesses, appellant put into evidence a large photograph of his business building which shows a sign on the front door that provides "Members Only." His attorney called a police detective to the witness stand and on direct examination elicited the following:

Q. And when you come up outside, it has a sign that's — That tells you it's an adult establishment?

A. Yes, sir.

Q. So you're aware of that going in?

A. That's correct.

Q. Did you ever become a member of that club when you went in to buy the evidence?

A. Yes. I had to purchase a membership before I was allowed access into the club.

Five pages of transcript later the following question and answer took place:

Q. And there's a sign that tells you that you have to be eighteen to get in?

A. Yes, sir.

After the above answer was completed, the State objected. A lengthy dialogue (four pages of transcript) between the attorneys and the court took place, and the court ultimately sustained the objection but did not strike the answer. Appellant made no offer of proof on any additional "contextual" material.

Since appellant did not tell us which ruling relating to the context of promotion of materials he thinks is erroneous, we can

only assume it is the one set out above. In it, the question was answered before an objection was made, so appellant could not possibly have suffered any prejudice, even if the subsequent ruling had been erroneous. In fact, the trial court later asked the prosecutor why he was making an issue over the matter since it was already in evidence.

Appellant argues that the trial court erred in prohibiting him from arguing about the context of the rule. However, he does not set out such a ruling, and we do not find one in the abstract. The colloquy on the subject which we find in the abstract is as follows:

> BY THE COURT: Why do we need to get into it a great deal more?
>
> BY MR. HALL [Appellant's Attorney]: Because I can argue to the jury, I believe, that they can determine the community standards based on the context in which this material was disseminated. That is, an adult establishment, limited solely to adults. Nobody was forced to come in off the street in there. [A]nd the State's offered jury instruction even refers to the average adult in the community.
>
> BY THE COURT: It doesn't say anything about minors in there whatsoever. You can argue that just as well. There's no dispute as to all of that . . .

Appellant next argues that the trial court erred in refusing his proposed instruction on the subject of context. The trial judge ruled that the proposed instruction misstated the law, conflicted with other instructions, and would confuse the jury. The proposed instruction would have told the jury that the test of obscenity is whether the material was offensive to the clientele of appellant's store. Such an instruction would have constituted a misstatement of the law because the test is not whether appellant's clientele finds the material to be obscene, but rather whether the average person finds that the material appeals only to the prurient interest.

Appellant's final point of appeal is that the trial court erred in not sustaining his objection to comments made by the prosecutor in closing argument. The argument has no merit.

[12] During appellant's closing argument, his attorney stated that the case involved "prosecution for an idea." In the State's closing argument the deputy prosecutor responded:

> Now, I like Mr. Hall's representation that this is an idea.
>
> . . .
>
> The thing that really offended me about — Most about Mr. Hall is the freedom of choice. That this is an idea. And that somehow, that I'm trompling on ideas here. Ladies and gentlemen, there's many ideas in our society that we simply cannot tolerate. We have to have laws to prohibit those types of ideas. We — The fact that somebody may think that overthrowing the government of the United States, and setting up a dictatorship — That's an idea. But we've got to stop it, because it's wrong. And it's a decline in our community that we cannot tolerate.

Appellant objected, arguing that the law does not prohibit ideas but rather the conduct which furthers certain ideas. In response to appellant's objection, the trial court merely stated that, "I'm not going to talk about this. I'm going to let the jury decide this case on the instructions I've given you." Appellant did not pursue the matter and thus failed to get a ruling on his objection. He may not now pursue the matter on appeal. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

[13] Even if we considered the court's statement to be the same as "objection overruled," we would not reverse because appellant is unable to show that he was prejudiced in any manner. *See Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). The trial court's instructions made clear the elements of the charged offense and that counsel's arguments were not evidence. The jury is presumed to follow the court's instructions. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). There is simply no reason for us to hold that the jury thought it was to convict appellant because of his "ideas" about pornography.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 (Supp. 1985)

is void for vagueness and amounts to the denial of due process and free speech. The statute does not define "obscene" in such terms as to give fair notice that sale or distribution of such materials is a violation of state law. The definition of "obscenity" has escaped definition; "obscenity" remains a rather amorphous concept until it is "defined" by a conviction.

Neither the statute nor our decisions have been able to define "obscenity" until after an arrest and conviction, and then it's too late. Our present statute is an obvious attempt to codify the definition found in *Miller* v. *California*, 413 U.S. 15 (1973). However, the statute failed in its attempt; instead the legislature enacted a statute that is so vague and uncertain as to practically require enforcement officers to act in a discriminatory and arbitrary manner in selecting arrestees. For example, § 41-3585.1(4)(b) describes "obscene material" as material which: "Taken as a whole appeals to the prurient interest of the average person, applying contemporary statewide standards . . ."

The *Miller* opinion states that:

> The basic guidelines for the trier of facts must be: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Obviously even the drafters of the statute here in question did not know the meaning of the word "prurient." As used in the statute, the average person has a "prurient" interest. The *Miller* case did not so state.

Admittedly, I do not know the meaning of the word "prurient" and certainly cannot tell from our statute what it means. The average person should be able to read a law and understand what is prohibited before the act is done. Certainly this Court should be able to determine what will violate the law before reviewing the evidence. We cannot take this statute and give the words their plain meaning and define exactly what conduct is permitted and what conduct is prohibited.

The majority opinion takes several quotes from *Brockett* v. *Spokane Arcades, Inc.* 472 U.S. 491 (1985) as the basis for the decision. The first is an attempt to explain the holding in *Roth* v. *United States*, 354 U.S. 476 (1957), which defines prurient as "i.e., material having a tendency to excite lustful thoughts." The opinion then cites Webster's New International Dictionary indicating that "prurient" means: "Itching, longing, uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . ." The best quote of all is: "pruriency is defined, in pertinent part as follows: '. . . quality of being prurient . . . '"

It seems to me that the statute and the precedent cited by the majority opinion are attempts to curb the thoughts of the average person. The first thing wrong with the statute is that it attempts to legislate statewide standards on obscenity and even goes so far as to prohibit cities from enacting contrary laws. Neither *Miller* nor any other case attempts to set *statewide* standards. Furthermore, *Miller* required contemporary community standards. The Arkansas statute makes no attempt to define "contemporary" or "community" standards, but instead attempts to set "statewide" contemporary standards anchored on a 1973 opinion.

The Arkansas statute is without doubt a laudable, but futile, attempt to control the sale and distribution of material which the average person in the state might consider indecent and immoral. However, instead of coming right out and stating what was prohibited in plain language, the legislature became entangled in a mass of conflicting statutes, opinions and ideas and enacted an impossible statute. There is a maxim that morals cannot be legislated. Neither can the minds of man be controlled. This attempt to do so must fail.

Nudity, sex, lust, desire and related topics have been present as long as man has existed. All of them are normal to humans. Laws cannot extinguish the thoughts and desires of man. Traffic in obscenity cannot exist without willing customers. None of the material was shown publicly nor was any person required to view it.

The majority quotes (4)(a) three or four times with a different meaning each time. The different meaning of words and acts is primarily what makes it near impossible to define an

appropriate statute warning people of what will and will not be allowed. No statute that I have read has defined "obscenity" in such terms as to notify the average person of what acts will violate the law. The definitions of obscenity will be different in the opinion of everyone attempting to define it.

The majority opinion is typified in the statement: "[I]t was not error for the trial judge to fail to require expert evidence that the materials were obscene when the materials themselves were placed in evidence." What more proof is needed to reveal that this is a case of not knowing how to define it or what it is "until we see it." The opinion goes on to state that the materials are the "best evidence of what they represent." The opinion is bottomed upon the statement: "*Here the state met its burden of proof of obscenity by introducing the materials themselves*" (emphasis added). The opinion continues by stating: "No separate proof of community standards was necessary." This completely ignores the *Miller* holding and is in fact contrary to the criteria stated in *Miller*. The net effect of the majority opinion is that "obscenity" cannot be defined but becomes apparent when the materials are presented to a trier of fact or to an appellate court. As the opinion states, the appellant was not required to prove that the materials were not obscene, but neither was the state required to prove the materials were obscene.

To be valid a statute must provide fair notice to dealers of newspapers, magazines, movies, video tapes and other methods for the exchange of ideas, that sale or distribution of such materials may bring prosecution. Justice Brennan, dissenting in *Miller*, stated: "[A]fter sixteen years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas [on obscenity], including the one announced today, can reduce the vagueness to a tolerable level . . ."

I think the trial court here wrongly refused to allow proof of community standards. Availability of the same materials at many other retail and wholesale outlets in Pulaski County was, in my opinion, relevant and material. Acceptability is one criterion to be considered when trying to determine what constitutes obscenity. No reason is given for selection of the defendant for prosecution for doing that which others may continue to do. Apparently the legislature intended to "set a net large enough to

catch all *possible* offenders" and leave it to the prosecuting authorities to step in and select those who will be detained and punished. If this was the intent of the legislature, then it has been successful. The statute as it is written leaves the police and prosecutor in a position to proceed discriminately against persons or groups who incur disfavor. What is obscene to one policeman or prosecutor may not be obscene to another policeman or prosecutor. We should not invite arbitrary or erratic law enforcement. The trial court refused to allow evidence of tolerance in the community unless it was first shown that such materials were acceptable. Tolerance is quite different from acceptance, which connotes approval. The Court thus created an impossible and improper burden for the appellant.

Censorship violates the mandates of the First Amendment to the Constitution of the United States. There *are* limitations to the guarantee of free speech. However, such limitations are not relevant to the present situation. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 is an impermissible intrusion into the right of freedom of speech and freedom of the press. However offensive the materials may be to some people, they may be completely acceptable to others. Since the trial court prohibited proof of tolerance in the community, we do not know how acceptable such materials may be to the community. Therefore, even if the statute is constitutional, the case should be remanded to allow proof on the question of whether these materials are considered obscene by state or community standards.